ORIENTAL RUBBER AND PALM OIL SDN. BHD. v. PEMUNGUT HASIL TANAH, KUANTAN

[O.C.J. (Shaik Daud J.) July 18, 1984]
[Kuantan – Originating Motion No. 6 of 1983]

Land Law – Land Acquisition – Award made 3½ years after gazette notification – Award grossly unreasonable and abuse of powers – Land Acquisition Act 1960, s.8.

The applicants were registered owners of the parcel of lands known as Lot 216 Mukim Ulu, Kuantan and Lot 3619 Mukim of Kuala Kuantan. The State Authority of Pahang vide Gazette Notification No. 486 dated August 16, 1979 published a declaration pursuant to section 8 of the said Act stating that it intended to acquire the said lands for "Tapak Ranchangan Rumah Pancing/Sungai Charu". After a lapse of 3½ years, the inquiry relating to the acquisition was held on November 4, 1982 and completed on March 3, 1983. The offer of award of compensation amounting to a total of $323,900/- was made by the Collector on March 25, 1983.

On an application *ex parte* on June 16, 1984, leave was granted by this Court to the owner of the lands to apply for an order of certiorari to remove into the Court and to quash the decision and the said award.

Held: (1) in the absence of any reasonable explanation, the delay of 3½ years was unreasonable and was an injustice to the landowner because the award given by the Collector in March 1983 was based on the market value of the land in August 1979. Such a delay was tantamount to an abuse of power rendering the enquiry and all subsequent proceedings null and void;

(2) the award of the Collector of March 25, 1983 should therefore be called in and quashed.

Cases referred to:

(1) *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang* v. *Ong Gaik Kee* [1983] 2 M.L.J. 35.
(2) *Pemungut Hasil Tanah, Daerah Barat Daya (Balik Pulau) Pulau Pinang* v. *Kam Gin Paik & Ors.* [1983] 2 M.L.J. 390.

ORIGINATING MOTION.

Ghazi Ishak for the applicants.

Dato' Wan Mohamed bin Wan Muda (Legal Adviser) for the respondent.

Cur. Adv. Vult.

Shaik Daud J.: On an application *ex parte* on June 16, 1984 leave was granted by this Court to the owner of the lands to apply for an order of certiorari to remove into the Court and to quash the decision and award made by the Collector of Land Revenue, Kuantan, on March 25, 1983. Pursuant to that this Notice of Motion was filed on June 28, 1984. The statement in support of the motion together with the affidavit of the owner of the land set out the main ground and that is that the delay of about 3½ years between the gazette notification under section 8 of the Land Acquisition Act 1960 (hereinafter referred to as "the said Act") and the date of the making of the award was grossly unreasonable as to amount to an abuse of the powers.

The relevant facts leading to this application are not in dispute. The applicants are the registered owners of the parcel of lands known as Lot 216 Mukim Ulu Kuantan and Lot 3619 Mukim of Kuala Kuantan. The State Authority of Pahang vide Gazette Notification No. 486 dated August 16, 1979 published a declaration pursuant to section 8 of the said Act stating that it intended to acquire the said lands for "Tapak Ranchangan Rumah Murah Pancing/Sungai Charu". After a lapse of 3½ years, the inquiry relating to the acquisition was held on November 4, 1982 and completed on March 3, 1983. The offer of award of compensation amounting to a total of $323,900/- was made by the Collector on March 25,1983.

An affidavit in reply on behalf of the Collector sworn to by one Encik Hashim bin Abdullah, the Assistant Collector, was filed. In it Encik Hashim, apart from setting out the procedure he adopted in the process of the acquisition, deposed that throughout the proceedings he had conducted in accordance with the letter and spirit of the said Act. Nowhere in the affidavit did Encik Hashim dispute that 3½ years lapsed between the date of the gazette notification under section 8 of the said Act, and the date of the award. In view of that I take it that this fact is never in dispute. The affidavit of Encik Hashim contains no explanation whatsoever as to why there was such a delay of 3½ years. The Court is therefore left without any evidence as to why there was this delay. The Federal Court, in *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang* v. *Ong Gaik Kee*(1) held that in the absence of reasonable explanation for the delay of eight years, the delay tantamounts to an abuse of power which renders the enquiry and all subsequent proceedings null and void. This same view was also adopted in another Federal Court decision of *Pemungut Hasil Tanah, Daerah Barat Daya (Balik Pulau) Pulau Pinang* v. *Kam Gin*

Paik & Ors. (2) . The rationale behind this view is succinctly expressed by Salleh Abas C.J. (as he then was) at page 37 of *Ong Gaik Kee's case:*

"The next relevant issue is the injustice caused to the landowner by the delay in holding the enquiry and the making of the award. Because the market value of the land has to be determined as the value prevailing on the date of the declaration – see paragraph 1 (i) of the First Schedule to the Act – the effect of the delay is that the landowner has to be awarded on the date of the award the past value as on the date of the declaration without taking into account the increase in the price of the land and the effect of inflation which have occurred in the meantime. Thus the longer the delay in making the award is, the greater would be the injustice to the landowner."

As I said earlier, in his affidavit-in-reply the Assistant Collector while not denying that there was the delay of 3½ years did not give any explanation as to why there was that delay. As such the Court is left without evidence as to the reasons for the delay. The learned State Legal Adviser in his submission sought to explain the delay. He said that as the purpose of the acquisition in question was for a low cost housing project, and after making the declaration under section 8 of the said Act, the Authority had to be satisfied that the response from the people to the proposed project would be good for otherwise public funds would thereby be wasted. With due respect; surely submissions by Counsel must be based on evidence already adduced before the Court. Whatever is said in submission must necessarily be only a recapitulation of evidence already adduced drawing the attention of the Court to salient points. As such, submissions by counsel on points or facts of which there is no evidence before the Court cannot, to my mind, be substituted for evidence. In any case, the explanation given in submission does not appear to be logical. Again with respect, this explanation even if it were to be accepted cannot, in my view, be held to be a reasonable explanation. Any such findings by the Authority would surely have been done long before action is taken under section 8 of the said Act. When one looks at the Act itself it is clear that the various steps to be taken from the moment an intention to acquire was formed, afford ample opportunity for the Authority to find out the response of the people. The purpose of section 4 is to put persons affected on notice and when the Authority acts under section 4, it must be taken that the Authority already has a basis and is satisfied to proceed with acquisition. When section 8 is acted upon the Authority must by then have finally decided for certain that the acquisition is to be proceeded with to its completion. Surely the Authority would have taken steps to ensure that the intended project would receive good response from the people and be satisfied long before action is taken under section 8 of the said Act. According to the affidavit of the Assistant Collector, a special committee was set up by the State Authority for this purpose but this special committee only decided to proceed in June 1982. Again no explantion was given as to why this was so. Surely the special committee would have decided long before action under section 8 of the said Act was taken. From this it would appear to me that the State Authority had put the cart before the horse. Instead of the special committee deciding before action under section 8 was taken, it appeared to have only decided after action under section 8 had been taken.

In view of the two Federal Court decisions mentioned earlier, two issues arise for me to determine in this case. First, whether the 3½ years delay is, in the circumstances, reasonable and secondly, whether such a delay had caused an injustice to the landowner.

While it is true that section 10 of the said Act does not prescribe the time within which the enquiry must be held but looking at the said Act as a whole it cannot be denied that the proceedings under the said Act must be done with "the convenient speed". What is to be considered "convenient speed"? Salleh Abas C.J. (as he then was) in *Ong Gaik Kee's* case said at page 38 thus:–

"What then is 'the convenient speed'? In our view it must be 'as soon as possible' or 'within a reasonable time' and not 'as late as possible'. Obviously what amounts to 'convenient speed' must vary from case to case . . . . . ."

That the Collector is required to make the enquiry with all convenient speed is clearly seen in paragraph 1(i) of the First Schedule of the said Act. As this paragraph fixes the market value of the land as on the date of the declaration, it is implicit that the Collector is duty bound to hold the enquiry with convenient speed so that the market value of the land in question would not be substantially different from the prevailing at the date of the declaration. With this in mind, it cannot be denied that values of land in this country have always been on the increase although not necessarily by leaps and bounds in certain places nevertheless on the increase. As such, I am of the view that in the circumstances even a

delay of 3½ years would certainly make a lot of difference in the value of land in and around a developing town like Kuantan. The legislature had finally recognised that there had been undue delay in many land acquisition cases and that such a delay would act as an injustice to the landowner. With that in mind it amended section 8 of the said Act by inserting a new sub-section (4) which provides that a declaration under sub-section (1) of section 8 of the said Act shall lapse and cease to have any effect on the expiry of two years after the date of its publication in the Gazette of which the Collector has not made any award. In other words, the legislature has now deemed it fit to restrict the time to only two years for awards of compensation to be made after a gazette notification under section 8 of the said Act. It must be emphasised that this amendment has no application to the instant case because it came into effect only in January 1984, nevertheless I am of the view that the amendment is certainly a guiding light in the corridor of darkness as to what should be "convenient speed".

In my judgment in the present case, as there is no evidence upon which the Court can act to consider that the delay of 3½ years is reasonable, it is left in the dark as to why there was such a delay. In the absence of any reasonable explantion, it is my judgment that the delay of 3½ years is unreasonable and has caused an injustice to the landowner because the award given by the Collector in March 1983 was based on the market value of the land in August 1979. Such a delay tantamounts to an abuse of power which renders the enquiry and all subsequent proceedings null and void. Accordingly, the award of the Collector made on March 25, 1983 is hereby called in and quashed. The cost of this motion is to be taxed and paid by the Collector.

Order accordingly.

Solicitors: *Presgrave & Matthews.*

CHOY CHEONG v. KIEW KIM

[A.C.J. (Wan Hamzah J.) July 27, 1984]
[Kuala Lumpur – Civil Appeal No. 3 of 1983]

Family Law – Maintenance – Deed of dissolution of marriage – Clause providing wife solely responsible for maintenance of children – Validity of clause.

Jurisdiction – Maintenance claim – Whether magistrate had jurisdiction to hear on issue of validity of dissolution of marriage – Subordinate Courts Act 1948 (Revised 1972), s. 69(k).

The respondent made a complaint to the magistrate against the appellant, the respondent's husband, alleging that he had neglected to provide maintenance for her and her three children. She asked that the appellant be ordered to pay maintenance for her and the children from January 1981. The appellant's main ground of defence was that they had executed a deed of dissolution of marriage and therefore she was no more his wife. The magistrate proceeded to hear on the issue of the validity of the deed of dissolution of marriage. She held that the respondent succeeded in her contention of *non est factum*, and the magistrate made an order of maintenance of $2,000 per month for the respondent and the three children with effect from January 1982.

The main ground of appeal was that the magistrate had no jurisdiction to hear and determine the question of validity of the dissolution of marriage in view of section 39(k) of the Subordinate Courts Act 1948 (Revised 1972).

Held: (1) the magistrate had jurisdiction to consider and determine the issue of the validity of the deed of dissolution;

(2) however, the magistrate's finding should be set aside as being perverse, and the proper finding should be that the respondent had voluntarily signed the deed fully aware that it was a deed of dissolution of marriage;

(3) since the marriage was dissolved as from December 17, 1980 (the date of the deed) the respondent was no more entitled to maintenance as from that date;

(4) however, the appellant could not relieve himself of the responsibility to provide maintenance for the children merely by inserting clause 5 in the agreement. There was no evidence to show that he had provided for the children assets or investments from which income would be obtained for the maintenance of the children;

(5) the magistrate's orders should be substituted with an order that the appellant should pay the respondent $300 per month for the maintenance of the three children commencing from February 1981 until they reach their respective age of majority.

Cases referred to:

(1) *R. Muthu Thambi* v. *K. Janagi* [1955] M.L.J. 47.
(2) *Che Wah* v. *Mohamed Yassin* [1957] M.L.J. 39.